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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

Addendum

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ITALY

[Original: English]

[18 September 1992]

1. Italy expresses once again its appreciation for the work carried out by the International Law Commission and its Special Rapporteurs on the subject of jurisdictional immunities of States and their property. In particular, Italy welcomes the accomplishment by the Commission of the task of adopting the final draft articles related to this very important and delicate matter. At the same time, the need to promote a large convergence of views on the issues raised by the text submitted by the Commission requires, in the opinion of the Government of Italy, that a thorough review of such issues be conducted within the Sixth Committee during the forty-seventh session of the General Assembly. In this respect, Italy intends to participate in the open-ended working group established under resolution 46/55 of 5 December 1991 and thus contribute to the progress of the discussion on both substantive and procedural points.

2. On the question of immunity of States from the jurisdiction of the courts of another State, Italy recognizes that a considerable effort has been made by the Interntional Law Commission in the search for solutions that would achieve the necessary balance between the main tendencies of State practice. However, there are also elements in the text adopted by the International Law Commission indicating that such balance is still far from being reflected, at least to an adequate extent in the final draft articles. In addition, other circumstances demand a further effort, at this stage, aimed at considering ways to improve the regime proposed by the Commission and make it more responsive to the attitude and the needs of today's international society.

3. First of all, the International Law Commission draft seems to contradict from various points of view the dominant tendency of State practice to circumscribe the application of immunity of States from foreign jurisdiction to certain activities involving the exercise of the sovereign authority of a State. The text of article 5 shows in fact from the outset the adherence of the draft to the theory under which immunity is the rule and the cases of submission of a State to the jurisdiction of foreign Courts are the exceptions, to be interpreted as such in a restrictive way. Moreover, the scope of application of these same exceptions is sometimes expressly narrowed by the relevant provisions of the draft. One may refer, in particular, to the inclusion of the "purpose" of the contract or transaction involved among the criteria that are relevant for determining the notion of "commercial transaction" in which a State is engaged (article 2, paras. 1 (c) and 2, and article 10); or to the conditions required by article 12 for excluding the immunity from jurisdiction in proceedings which relate to compensation for damage to persons or properties caused by an act or omission attributable to a State. In the first example, the present formulation of article 2, paragraph 2, precludes the submission of a State to the jurisdiction of foreign courts, even with respect to typical commercial transactions such as the purchase of goods or the provision of services, whenever the same State

claims that they were effected for a "public purpose". Whereas, regarding article 12, the circumstance that immunity cannot be invoked only if the act or omission occurred in the territory of the State of the forum and if the author was present in that territory at the time of the act or omission, is highly detrimental, for instance, to the adjudication in the affected State of cases of transfrontier pollution due to (commercial and non-commercial) activities of the source State. Conversely, while domestic legislations and international instruments tend often to exclude that a State may invoke immunity from jurisdiction in proceedings relating to contracts of employment concluded with a national of the State of the forum for work to be performed in the territory of such latter State (regardless of the functions assigned to the employee), article 11, paragraph 2 (a), of the draft grants the immunity, in the same circumstances, if "the employee has been recruited to perform functions closely related to the exercise of governmental authority", thus providing additional evidence of the tendency of the text proposed by the Commission to accord States a degree of immunity from foreign jurisdiction wider than that to which they are entitled under present international practice.

4. On the other hand, it should be noted that the application of many countries, including Italy, of the concept of "restrictive immunity" of States from the jurisdiction of the courts of another State has been carried on for a long period of time without giving rise to true international disputes. Furthermore, the changes that have recently occurred in the structure of the international community and in various national economic systems open the possibility for a modification in the attitude of a number of States traditionally in favour of the principle of "absolute immunity". Finally, it must be considered that every extension of the immunity of States from foreign jurisdiction implies an equal limitation of the individual right of access to courts: i.e., of a fundamental human right which is proclaimed today not only by most national constitutions but also by various important international instruments. As a result, the acceptance by States practising restrictive immunity of a different regime privileging in a rigid way the prerogatives of sovereignty cannot be justified on the ground that divergent views have led in this area to significant conflicts at an international level. Nor would such a regime reflect a series of visible trends developing in present international society and legislation, to which special attention should be devoted in order to facilitate widespread agreement on the question at stake.

5. Similar considerations can be made as regards the issue of State immunity from measures of constraint in connection with proceedings before a court, which is addressed in articles 18 and 19 of the International Law Commission draft. In fact, the possibility for a State to exercise enforcement jurisdiction over foreign State assets is severely limited by these provisions and therefore the rights of private litigants vis-á-vis foreign States are equally curtailed. In particular, the enforcement within a State of judgements rendered against another State is made conditional upon the express consent of the defendant State (article 18, paras. 1 (a) and (b)), or upon the circumstances that the claimant provides evidence of the destination of the property concerned to "other than government, non-commercial purposes"

(para. 1 (c) of the same article). Besides, article 19 adds a detailed list of categories of property of a State that are exempted a priori from measures of constraint, and for some of these categories the text does not seem to provide sufficient guarantees that the exempted property is always utilized for non-commercial purposes. More generally, also in this field the International Law Commission draft tends to accord States a far vaster immunity than they are entitled to under current customary international law. Consequently, the possibility of following a more balanced approach should be attentively explored, with a view to achieving an adequate level of consensus. It is important to note, on this problem, that in many States, including Italy, the tendency is steadily growing towards more restrictive immunity.

6. Against this background, Italy believes that all efforts should be made in order to avoid frustration of the work of the International Law Commission by the lack of sufficient acceptance by Governments of a convention on jurisdictinal immunities of States and their property. Therefore, the question of a plenipotentiary conference for the adoption of such a convention should be resolved having regard, primarily, to the object of defining a regime which can obtain the widest support and provide an effective regulation of interstate relationships in the area concerned.

VENEZUELA

[Original: Spanish]

[22 September 1992]

1. The following is the opinion of the Government of Venezuela on the matter:

2. In accordance with paragraph 4, subparagraph (a), of General Assembly resolution 46/55, the working group to be established in the Sixth Committee during the forty-seventh session should examine issues of substance arising out of the draft articles, in order to facilitate the conclusion of a convention through the promotion of general agreement.

3. In accordance with paragraph 4, subparagraph (b), of the resolution, the working group should examine the question of the convening of an international conference, which could be held in 1994 or subsequently, to conclude a convention on jurisdictional immunities of States and their property.

4. So far as comment on the substantive issues in the aforementioned draft articles is concerned, on several occasions the Venezuelan Government has expressed its views on the various versions, prepared by the International Law Commission, for the articles which it has now completed in the second reading.

5. From our point of view, the text of 22 articles, as drafted in the second reading, meets the expectations and concerns of Venezuela on the matter and, in our judgement, addresses the important situations meriting regulation as regards the jurisdictional immunities of States and their property.

6. It may be necessary, however, to examine, probably in the working group, the questions raised by some members at the conclusion of the debate in the Commission, such as State-owned or State-operated aircraft engaged in commercial service and space objects, with the understanding, furthermore, that the draft of the final provisions, including a legal mechanism for the settlement of disputes, could be prepared by the Secretariat or the conference of plenipotentiaries.

7. Concerning the adoption of the draft articles by the international community, in accordance with the Commission's recommendation made at its 2235th meeting, on 4 July 1991, we believe that the international conference of plenipotentiaries should have competence to examine the draft articles and to conclude an international convention on the subject.

8. As provided in resolution 46/55, this conference could be held in 1994 or subsequently, depending on how the States in the working group and the Sixth Committee decide at the forty-seventh session of the General Assembly.